Laborers International Union of North America, Local No. 320 *and* Northwest Metal Fab & Pipe, Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 290. Case 36–CD–201

August 31, 1995

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The charge in this 10(k) proceeding was filed on February 21, 1995, by Northwest Metal Fab & Pipe, Inc. (the Employer), alleging that the Respondent, Laborers International Union of North America, Local No. 320 (Laborers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 290 (Pipefitters). The hearing was held on March 28, 1995, before Hearing Officer Jeffrey E. Jacobs. Thereafter, all parties filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer is an Oregon corporation engaged in the installation, repair, and replacement of pipelines. The Employer has gross annual income in excess of $1 million and annually purchases materials valued in excess of $50,000 directly from suppliers located outside the State of Oregon and causes the goods to be shipped directly to its Oregon facilities or jobsites. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and Pipefitters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of the Dispute*

In late 1994 Mobil Oil retained the Employer to replace and install pipe at a Portland, Oregon tank farm. In January 1995[1] Pipefitters business representative, Shropshire, visited the jobsite and observed laborers doping and wrapping underground pipe.[2] Shropshire complained to the Employer that the work was covered by the Pipefitters contract and pipefitters should do such work. Shropshire promised that if the work were reassigned, ''we'd just call it even and go on.'' Because laborers continued to do the work, Pipefitters filed a grievance in late January.

In early February Employer's president, Morgan, contacted Laborers Business Manager Sutherland about the Pipefitters' claim of the work. According to Sutherland, he told Morgan that laborers would picket or walk off the job if the work was given to employees represented by Pipefitters, and at a later meeting with Morgan at the office of Morgan's attorney, he repeated the statement. According to Morgan, Sutherland claimed that the work belonged to Laborers and that he would pursue whatever means necessary to retain the work, including ''[t]aking it to court.'' Morgan recalled that at the later meeting, Sutherland indicated that picketing and work stoppage might occur. On cross-examination, Morgan testified he was unsure whether Sutherland had used the words picketing and work stoppage.

On February 10, Laborers sent the Employer a letter claiming the work in dispute and stating that, if the Employer reassigned the work, Laborers ''will take appropriate action of any type or nature, to the extent required, to preserve this work.'' It is not clear whether this letter was sent before or after the meeting in the Employer attorney's office.

On February 17, the Plumbing and Piping Industry Council joint grievance committee declared that the Employer had violated the Pipefitters agreement and ordered the Employer to pay Pipefitters $1200 as compensation for lost wages and benefits. At the time of the 10(k) hearing, Pipefitters had taken no action to enforce the award.

B. *Work in Dispute*

The disputed work is the doping and wrapping of underground pipe and pipe joints at the Mobil Oil Portland, Oregon terminal project.[3]

[1] All dates hereafter refer to 1995, unless otherwise indicated.

[2] ''Doping and wrapping'' involves applying glue to a pipe and then wrapping the pipe with a special tape that prevents rusting.

[3] The notice of hearing describes the disputed work as follows: The doping and wrapping of underground pipe and pipe joints. The Employer and Laborers were willing to stipulate to this description of the work in dispute. According to the Employer, the job bid was for wrapped pipe, but the pipe delivered was unwrapped. Pipefitters claimed that the description should be limited to doping and wrapping of pipe that arrived at the jobsite unwrapped. Based on our review of the record, we find that the notice of hearing accurately describes the work in dispute, but, in accordance with our usual practice, we shall add to the description the particular jobsite where this dispute arose.

C. *Contentions of the Parties*

The Employer asserts that there is reasonable cause to believe that the Respondent has violated Section 8(b)(4)(D) and that the dispute is properly before the Board for determination. The Employer further urges that, based on the relevant criteria, the work in dispute should be assigned to its employees represented by Laborers. Laborers agrees with the Employer's contentions.

Pipefitters claims that there is insufficient evidence to support a finding that Laborers made an unlawful threat[4] and therefore no reasonable cause to believe the Act has been violated. Pipefitters further argues that, if the Board finds a jurisdictional dispute exists, the work should be awarded to employees represented by Pipefitters.

D. *Applicability of the Statute*

When Laborers learned that Pipefitters claimed the disputed work, Laborers' agent Sutherland told Employer president Morgan that laborers would picket or walk off the job if the Employer reassigned the work. This statement, which Sutherland reiterated at the hearing and which Morgan confirmed on direct examination, constitutes a threat of prohibited activity.

Pipefitters claims that there is insufficient evidence to find a threat because Morgan testified on cross-examination that he was unsure whether Sutherland referred to picketing or other words signifying work stoppage, and therefore the record does not establish that any threat registered with the Employer. It is, however, well established that the Board need not rule on the credibility of testimony in order to proceed to a determination of a 10(k) dispute because we only need to find reasonable cause to believe that the statute has been violated. *Essex County Building & Construction Trades Council*, 243 NLRB 249, 251 (1979).

The parties stipulated that no method for the voluntary adjustment of the dispute has been agreed on.

Accordingly, we find reasonable cause to believe that Section 8(b)(4)(D) has been violated and that there is no voluntary method of resolving the jurisdictional dispute that would be binding on all the parties.

Having found that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act, we conclude that the dispute is properly before the Board for determination.[5]

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

Neither union has been certified by the Board as the bargaining representative of the employees performing the disputed work. The Employer is party to contracts with both Laborers and Pipefitters. As Pipefitters concedes, this factor is neutral because neither contract specifically refers to the work in dispute. We find that these factors do not favor awarding the work in dispute to either group of employees.

2. Employer preference

The Employer prefers that the disputed work be performed by employees represented by Laborers. We find that this factor favors awarding the work in dispute to employees represented by Laborers.

3. Past practice

The Employer's witnesses testified that the Employer's past practice was to assign doping and wrapping work to laborers.

Jerry Moss, a member of Pipefitters who worked for the Employer on several projects, testified for Pipefitters. He stated that on one project when he served as foreman, he assigned doping and wrapping work to pipefitters. On another project, when he was not foreman, the Employer's superintendent (who was also a member of Pipefitters) assigned doping and wrapping work to Moss. Employer President Morgan, on rebuttal, testified that he was not aware of Pipefitters performing doping and wrapping on its projects.

We find that the Employer's practice has been, for the most part, to assign the disputed work to laborers,

[4] At one point during the hearing, Pipefitters claimed that there were not competing claims for the disputed work, apparently because it was prepared to argue that its grievance did not constitute a claim for the work. Pipefitters' brief does not pursue this argument. In any event, it is clear from the record that, aside from the grievance, Pipefitters claimed that the Employer should reassign the disputed work to employees it represented.

[5] Pipefitters also argues that this is a contractual rather than a jurisdictional matter. This argument is based on the contract's provision that requires the Employer to follow ''National President's jurisdictional agreements'' and jurisdictional awards purportedly awarding the work in dispute to pipefitters. We reject the attempt to characterize this matter as contractual rather than jurisdictional. The jurisdictional awards are further discussed below.

and that on a few occasions (without the owner's knowledge) pipefitters have performed the work. Accordingly, we find that this factor on balance favors awarding the disputed work to employees represented by Laborers.

4. Area and industry practice

Laborers presented testimony that all doping and wrapping work of which it is aware is performed by laborers. Pipefitters presented testimony that pipefitters have performed doping and wrapping work for many employers.

Based on the evidence presented, we find that this factor is inconclusive and does not favor an award of the disputed work to either group of employees.

5. Relative skills

Employees represented by the Laborers and Pipefitters are both capable of performing the disputed work. We find this factor does not favor assignment of the disputed work to either group of employees.

6. Economy and efficiency of operations

The record contains no evidence that would support a finding that the Employer would experience greater economy and efficiency of operations by utilizing one group of employees rather than the other.[6] Accordingly, we find that this factor is inconclusive.

7. Awards

Pipefitters introduced a number of awards and other documents referencing doping and wrapping of pipes, including awards of the National Joint Board for Settlement of Jurisdictional Disputes and the February 17 joint grievance committee decision, awarding the work to pipefitters. We are unable to determine from the Joint Board and joint grievance committee documents before us what evidence was presented to those bodies and we therefore cannot evaluate the awards according to our standards to determine the degree of deference to which they are entitled. Accordingly, we find this factor favors neither group of employees. See *Boilermakers Local 72*, 247 NLRB 73, 75 (1980).

Conclusions

After considering all the relevant factors, we conclude that employees of Northwest Metal Fab & Pipe, Inc., represented by Laborers International Union of North America, Local No. 320 are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's preference and past practice. In making this determination, we are awarding the work to employees represented by Laborers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Northwest Metal Fab & Pipe, Inc., represented by Laborers International Union of North America, Local No. 320, are entitled to perform the doping and wrapping of underground pipe and pipe joints at the Mobil Oil Portland, Oregon terminal project.

[6] The comparative wages rates of the two labor organizations is not a relevant consideration. See *Laborers Local 172 (Henkels & McCoy)*, 313 NLRB 978, 981 fn. 6 (1994).